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In the

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 189

THE CONNECTICUT LIGHT AND POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The undersigned, on behalf of the above-named Petitioner, pray that writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia entered on February 28, 1944, in the case between the above-named parties docketed therein as No. 8341.

OPINIONS.

The opinion of the Federal Power Commission, F.P.C. Opinion No. 75, May 15, 1942, is reported in 44 P.U.R. (NS) 170. (R. 63)[1] The opinion of the Court of Appeals for the District of Columbia (R. 1170) is reported in 141 F. 2d 14.

[1] This record is in several volumes, headed "Appendix to Brief for Petitioner."

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on February 28, 1944. Petition for rehearing was filed by Petitioner on March 13, 1944 (R. 1179), and was denied on March 25, 1944. (R. 1195)

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act,[2] 49 Stat. 860, 16 U.S.C., Section 8251(b), and Section 240 of the Judicial Code as amended, U.S.C., Title 28, Section 347.

QUESTIONS PRESENTED.

Has the Federal Power Commission[3] general jurisdiction over Petitioner so as to render Petitioner subject to its Uniform System of Accounts and other accounting requirements as of the time of the entry of the order of the Commission on May 15, 1942, or at any time between August 26, 1935,[4] and May 15, 1942?

This Court has held that a corporation which owns facilities subject to the jurisdiction of the Commission under Part II of the Act is a "public utility" within the meaning of that term as defined in the Act. *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61. If Petitioner is such a "public utility", it is subject to the accounting orders of the Commission. Under Section 201 of the Act, if Petitioner owns facilities for "transmission of electric energy in interstate commerce" and if its facilities are not "facilities used in local distribution", it is such a public utility. In the *Jersey Central* case, the Court said (p. 72):

> "* * * Commission power does not extend over all connecting transmitting facilities but only over those

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[2] Hereinafter referred to as "the Act".

[3] Hereinafter referred to as "the Commission".

[4] The amendment to the Federal Power Act under which the Commission claims jurisdiction became effective on that day.

which transmit energy actually moving in interstate commerce. Mere connection determines nothing." [Italics ours.]

The only facilities of Petitioner which were held by the pinion of the Commission to be subject to its jurisdiction t the times of the hearing and of the entry of the order f May 15, 1942, were facilities in a substation in Bristol, Connecticut, used only in connection with local retail distribution by Petitioner in Bristol. They were connected with line of the Connecticut Power Company, from which Petitioner purchased electric energy, which line was connected with generating plants in Connecticut and also with lines onnected with generating plants at more distant points outside of Connecticut. Petitioner did not contract for any nergy generated outside of Connecticut, and the price hich it paid was dependent upon the cost of coal at a enerating plant of another company in Hartford, Connecticut, which contracted with Petitioner's vendor to upply Petitioner's demand at Bristol. Petitioner had no ontrol over the source of supply and had no occasion to etermine the source of supply at any time.

Petitioner contends that its facilities were not "facilities or transmission of electric energy in interstate commerce" ithin the meaning of Section 201 of the Act, and that, hether or not they were such facilities, they were exempt rom the jurisdiction of the Commission as "facilities used n local distribution" within the meaning of that Section.

Petitioner also contends that it was not shown that any nergy from outside of Connecticut reached the facilities f Petitioner, and that the Court of Appeals erred in refusng to weigh the evidence on this point and in holding that he only question was whether there was substantial evience to sustain the findings of the Commission.

Other contentions of Petitioner are indicated in this etition and the supporting brief.

STATUTE INVOLVED.

The statute involved is the Federal Power Act, and the principal sections of importance here are Sections 3, 201, 301(a), and 313(a) and (b), printed in the appendix, pp. 44-48, *infra*.

STATEMENT.

The Commission, after hearings on its order to show cause directed to Petitioner and on the answer of Petitioner thereto,[5] entered an order on May 15, 1942, which by reference incorporated specific findings of fact and also a discussion entitled "opinion". (R. 83) The Commission determined that Petitioner "was", during various specified periods since August 25, 1935, and "continues to be" a public utility subject to the jurisdiction of the Commission. (R. 63-82) The order requires Petitioner to comply currently with accounting requirements applicable to such public utilities.

On June 13, 1942, Petitioner filed a petition for rehearing and stay of order. (R. 1155) This was denied by the Commission on June 23, 1942. (R. 84) The Commission in the order denying the petition did, however, extend the time within which Petitioner should commence the studies and work necessary to comply with the order.

On August 18, 1942, Petitioner filed in the Court of Appeals a petition for review pursuant to Section 313(b) of the Federal Power Act. (R. 1) After hearing, the Court below[6] affirmed the order of the Commission (R. 1178) and later denied a petition for rehearing. (R. 1195)

This case involves the construction of the phrases in

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[5] The answer denied that Petitioner had been a public utility subject to the jurisdiction of the Commission, but admitted that its accounts had not been kept in accordance with accounting orders of the Commission applicable to public utilities subject to the jurisdiction of the Commission.

[6] The Court consisted of Mr. Justice Miller, Mr. Justice Arnold (who wrote the opinion) and Judge Dobie.

Section 201 quoted above and the application of these phrases to the facilities of Petitioner in four districts in which the Commission held Petitioner owned facilities subject to its jurisdiction. (R. 64-69) Three of these districts, the Bristol, East Hampton, and Torrington-Winsted districts, were districts in Connecticut, for which Petitioner purchased electric energy from other companies for local distribution. The fourth district was the Groton district, in Connecticut, in which Petitioner sold electric energy to the Borough of Groton, which in turn sold part of the energy to another company which transmitted it from Connecticut to Fishers Island, New York. Except at Bristol, all the facilities of Petitioner in these districts had, prior to the hearing before the Commission, been severed from any lines which were connected in any way with any lines running outside of the State. (R. 74)

There was no finding that Petitioner ever owned facilities subject to the jurisdiction of the Commission in any of the other areas which it serves with electric energy.

The territory served directly by Petitioner covers a substantial part of the State of Connecticut. It serves electric energy in 107 towns, cities, and boroughs, which have a total population of about 660,000, not including about 130,000 served by other Connecticut utilities purchasing substantially all of their electric requirements from Petitioner. (R. 86-87)

There is no dispute as to the ownership and operation by Petitioner of the facilities in question, but Petitioner contends, *inter alia*, that they were not facilities for transmission of electric energy in interstate commerce within the meaning of the Act, and that in all four of the districts mentioned, except in the Groton district, all of the facilities of Petitioner over which the Commission held that it had jurisdiction were "facilities used in local distribution" within the meaning of Section 201(b) of the Act.

It was established by uncontradicted evidence that since Aug. 26, 1935,[1] Petitioner has owned or operated no property outside of Connecticut. It has owned no line which crossed the Connecticut boundary. It has owned no line connecting at the Connecticut state line with the line of any other utility. It has had no contract with any party outside of the State of Connecticut for the purchase or sale of electric energy. It has had no contract to deliver electric energy outside of Connecticut, or to receive electric energy outside or from outside of Connecticut. It has not bought or sold any electric energy outside of Connecticut. It has had no contract or arrangement calling for delivery of electric energy to any other company or utility at the state line or for the receipt of energy from any other company or utility at the state line. (R. 119-125)

The theory of the Commission that in the Bristol, East Hampton and Torrington-Winsted districts Petitioner owned or operated facilities subject to the jurisdiction of the Commission was predicated upon the establishment of three conclusions: (1) that energy of Massachusetts origin at times supplied part or all of the loads of Petitioner, (2) that Petitioner in purchasing such energy or supplying it over its facilities to its customers transmitted electric energy in interstate commerce, and (3) that some of the facilities of Petitioner by which such energy was received by Petitioner and delivered to its customers were not used in local distribution.

There was no finding as to the amount of electric energy transmitted from Massachusetts which came to these facilities of Petitioner or what part of the total amount of electric energy coming to these facilities came from Massachusetts. The testimony supporting the findings of the Commission

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[1] The date upon which the amendment to the Federal Power Act became effective.

was limited to a comparatively few hours of each year. (R. 454-455, 543-557, Ex. 85, R. 1150-1151)

The facilities of Petitioner which the Commission held subject to its jurisdiction are indicated in red on the map which is appended hereto after p. 48. The Bristol, East Hampton, and Torrington-Winsted districts were not, during the respective periods when the Commission found the facilities subject to its jurisdiction, connected with the main system of Petitioner.

These three districts were supplied by energy from the so-called C.P. lines, with which all three of these districts were connected. The term "C.P. lines" is an abbreviation for "Connecticut Power lines," the lines being owned by the Connecticut Power Company.[8] These lines consist of two circuits which transmit energy at 66,000 volts. They are located wholly in the State of Connecticut and run from a bus at a substation of the Connecticut Power Company, in Hartford, in a westerly direction to a generating plant owned by the Connecticut Power Company at Falls Village, Connecticut, near the New York line. (Ex. 38; R. 686; see also Exs. 70 and 73)

That substation of the Connecticut Power Company is adjacent to the large steam generating plant of the Hartford Electric Light Company and other steam plants of that company. All of these plants are connected electrically with the C.P. lines. (R. 970)

For the Winsted district Petitioner purchased energy from the Torrington Electric Light Company, which obtained its supply either from its own plant or from the

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[8] The Connecticut Power Company is a corporation entirely separate from Petitioner. The Connecticut Power Company and the Hartford Electric Light Company, which is referred to hereafter, were not affiliated in any way with Petitioner. Petitioner owned no stock in either of these companies, and neither of them owned any stock in the Petitioner. No person who was at any time an officer or director of Petitioner served simultaneously in a similar capacity either the Connecticut Power Company or the Hartford Electric Light Company. (R. 975-976)

Connecticut Power Company. For the East Hampton and Bristol districts Petitioner purchased energy directly from Connecticut Power Company. (Ex. 8, R. 1039, Ex. 25, 1055; Ex. 11, R. 1044) These contracts contained no express provisions as to the source of the energy, but there was a provision that the unit charge for energy supplied should be adjusted on the basis of the cost of coal in the bunkers of the South Meadow plant of the Hartford Company in Hartford.

The Connecticut Power Company at all times had an understanding with the Hartford Electric Light Company under which the Hartford was obligated to supply such capacity as might be required, in addition to the capacity of the Connecticut Power Company's own water power plants, to carry the loads on the C.P. lines, including those at Bristol, at Middletown (which included the East Hampton area of Petitioner), and at Torrington (which included the Winsted district of Petitioner). This understanding was eventually embodied in formal contracts, the one relating to Middletown and Torrington being dated June 1, 1936, and the one relating to Bristol being dated June 8, 1937. (Exs. 30, R. 1063; 36, R. 1072; 37, R. 1081; R. 941-944, 961, 964-966)

The Commission based its conclusion as to the presence of out-of-state energy on Petitioner's facilities connected with the C.P. lines upon the fact that a 66,000-volt double-circuit line running from Agawam, Massachusetts, across the Connecticut-Massachusetts boundary was connected to the bus in the substation of the Connecticut Power Company, at Hartford, mentioned above. Through this line the Connecticut Power Company at times obtained electric energy which was generated outside of Connecticut through the operation of the so-called Connecticut Valley Power Exchange. (R. 686)

The companies which contracted to supply those loads of Petitioner which were connected with the C.P. lines (*i.e.*, those in the three districts under discussion) have at all times been able to obtain the necessary supply from generating plants located in Connecticut, and at no time were the combined loads of Petitioner in these three districts greater than the amount of electric energy generated contemporaneously by plants in Connecticut which were connected with the C.P. lines. (R. 949-953) If any Massachusetts energy reached Petitioner's facilities in these three districts, it had been transformed and divided for local distribution before reaching Petitioner's facilities. (R. 689-690, 699-700)

The Commission also found that until February 28, 1941, Petitioner owned facilities at or near Groton and Montville and between those places which were subject to the jurisdiction of the Commission. (R. 64, 65) Its finding was based on the fact that Petitioner sold electric energy to the Borough of Groton, most of which the Borough of Groton used for local distribution in Connecticut, but part of which it sold and delivered to another company which transmitted the energy from Connecticut to Fishers Island, New York, for local distribution there. (R. 64, 533) The amount of such energy which went to Fishers Island was only about 1/5 of 1% of the total amount of energy generated and received by Petitioner, and no energy generated or transmitted by Petitioner has gone to Fishers Island since February, 1941. (R. 835-836, 196-197) All of the energy which went to Fishers Island had been transformed before leaving Connecticut. (R. 199-203)

The Court of Appeals held, without discussion of the legal principles involved, that in each of the four districts Petitioner had facilities "for transmission of electric energy in interstate commerce".

The Court did not discuss the question whether the facilities by which Petitioner distributed energy in the Bristol, East Hampton and Torrington-Winsted districts should be classified as local, saying that it was not relevant to the case. This conclusion was based upon its construction of the Act to the effect that the last sentence of Section 201(b) of the Act does not exempt from the jurisdiction of the Commission a company which owns only facilities used in local distribution. The Commission itself in its opinion in this case did not adopt or suggest this construction, and as far as we are aware its attorneys had not urged this construction of the Act until recently.

The Court of Appeals held, without discussion of its duty to weigh the evidence, that as to the questions of fact the sole question was whether the findings of the Commission were "sustained by substantial evidence", and it concluded that there was substantial evidence that energy generated in Massachusetts reached facilities of Petitioner in Connecticut at its East Hampton, Torrington-Winsted and Bristol districts.

The Court also held that the facilities of Petitioner at or near Groton had been subject to the jurisdiction of the Commission, but recognized the fact that after February, 1941, this was no longer the situation. In discussing the Groton situation, it made no mention of the contention of Petitioner that, under proper construction of the statute, sales to a municipal corporation could not be the basis of jurisdiction of the Commission.

The Court gave no particular attention to the fact that the status of Petitioner may have changed after the effective date of the Act but before the hearings and determination of the Commission. Its decision seems to rest in large part upon the fact that Petitioner discontinued its arrangements and connections with the Connecticut Valley Power Exchange prior to the effective date of the Act.

SPECIFICATION OF ERRORS.

The Court of Appeals for the District of Columbia erred:

1. In holding that Petitioner *is* a "public utility" subject to its jurisdiction under the Act, *i.e.*, as of the date of the Commission's determination, and in affirming the order of the Commission requiring current compliance with its accounting orders and system of accounts at the time of the making of its determination and for the future. And specifically in holding that any facilities of Petitioner in its Bristol district are facilities for "transmission of electric energy in interstate commerce" within the meaning of §201 of the Act, and in refusing to hold that all facilities in the Bristol district were exempt from the jurisdiction of the Commission as "facilities used in local distribution".

2. In affirming the order of the Commission insofar as such order was based upon the Commission's determination that Petitioner *was* such a "public utility" subject to its jurisdiction under the Act during past periods, by reason of Petitioner's ownership and operation of facilities for the receipt and distribution of electric energy in its Bristol, East Hampton or Torrington-Winsted districts. And specifically in holding that any facilities of Petitioner in these districts were facilities for "transmission of electric energy in interstate commerce" within the meaning of §201 of the Act, and in refusing to hold that all facilities in these districts were exempt from the jurisdiction of the Commission as "facilities used in local distribution".

3. In holding that a company is such a "public utility", subject to the general jurisdiction of the Commission under the Act, even though its only facilities over which flows electric energy generated in another State are facilities "used in local distribution".

4. In affirming the order of the Commission insofar as such order was based on the Commission's determination

that Petitioner was a "public utility" under the Act, during a past period, by reason of Petitioner's ownership and operation of facilities for the sale and delivery of electric energy to the Borough of Groton. And specifically in holding that any such facilities were facilities for "transmission of electric energy in interstate commerce" or for "the sale of electric energy at wholesale in interstate commerce" within the meaning of § 201 of the Act; in refusing to hold that all such facilities were exempt from the jurisdiction of the Commission because used in sales to a municipal corporation; and in refusing to hold that the amount of energy which was transmitted to Fishers Island was so negligible that it must be disregarded.

5. In determining Petitioner's status under the provisions of the Act, by reference to Petitioner's acts in separating itself from the Connecticut Valley Power Exchange prior to the effective date of the 1935 amendments to the Act, and further in determining Petitioner's status under the Act by the application of standards which are not contained in the Act or in any other applicable statute.

6. In holding that the Court was under no duty to weigh the evidence in regard to jurisdictional facts and to make its own determination thereon. This was based upon improper construction of the statute, or, if its construction of the statute was correct, the statute is unconstitutional—

(a) In that it deprives Petitioner of property without due process of law in violation of the provisions of Article V of the Amendments to the Constitution of the United States;

(b) In that it curtails the powers of the Judiciary in violation of the provisions of Article III of Section 2 of the Constitution; and

(c) In that it confers on the United States a power reserved to the State of Connecticut.

REASONS FOR GRANTING THE WRIT.

1. The construction of the term "facilities for transmission of electric energy in interstate commerce" in Section 201 of the Federal Power Act adopted by the Court of Appeals and its construction of the last sentence of Section (b) thereof to the effect that ownership merely of facilities used in local distribution may subject the owner to the jurisdiction of the Commission are, we submit, not justified. The constructions adopted bring about results not intended by the Congress which enacted the statute, as disclosed by its legislative history. (See pp. 21-22, 28-31, *infra*.) These questions are questions of substance relating to the construction of a Federal statute and of general importance, which have not been, but should be, settled by this Court; and they have not been raised in any case in this Court, either on the merits or on petition for certiorari.

If Petitioner is subject to the jurisdiction of the Commission because of its facilities at Bristol, this would result only because it happens that, without Petitioner's having any control of the matter, some of the energy which Petitioner purchases solely for local distribution there, comes from a company whose lines, served by generating plants in Connecticut, also connect with lines of other companies which in turn are connected with generating plants outside of Connecticut. And, under the holding here, it makes no difference (1) that the price of the energy is based solely upon costs pertaining to generation in the State, or (2) that the generating plants in the State with which the lines are connected are sufficient to supply Petitioner's demand, and actually did at all times contemporaneously generate a sufficient supply to satisfy its demands. If such a company is subject to the general jurisdiction of the Commission, it is difficult to conceive of any ground for exempting from the jurisdiction of the Commission any small local distributing

company whose facilities are connected with lines which are ultimately connected with other lines leading eventually to generating plants outside of the State. It is clear, however, that Congress did not intend to subject companies to the jurisdiction of the Commission merely because they have facilities connected to parts of a system of power transmission situated in more than one State. (See pp. 21-22, 28-31, *infra*.) The facilities and rates of such local companies are subject to State regulation. The purposes of the Act will be fulfilled if, as here, the Commission has jurisdiction over the company which has an interstate line and its predecessors in the chain of power generation and transmission. *It is unnecessary and* unjustifiable to extend the Commission's jurisdiction to every company which receives energy from such company or from other companies which subsequently purchase energy from such company.

On the basis of the holding below, it seems highly probable that innumerable small companies would be subject to the jurisdiction of the Commission. A survey made by the Edison Electric Institute indicates that there are over 1000 small companies which buy energy from larger systems, the supply of almost all of which may have some component from an interstate source, and that there is some such small company in each of 46 different States.

If a company is subject to the jurisdiction of the Commission because of the ownership of facilities subject to the jurisdiction of the Commission, even though such facilities may constitute but a minute portion of its property and may be located in one isolated place, the company is subject to the jurisdiction of the Commission in general, and whether large or small it must keep its accounts for all parts of its system in accordance with the orders of the Commission.[9] It must, upon request of the Commission, make an inventory of all or any part of its property with a statement of the original cost thereof, and it must keep

[9] Section 301.

the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.[10] It must file such annual and other periodic or special reports as the Commission may order.[11] It must keep its depreciation accounts for all parts of its system as the Commission may require.[12] It may not sell, lease, or otherwise dispose of any of its facilities of a value in excess of $50,000, or merge or consolidate such facilities without having first secured an order of the Commission authorizing it to do so.[13]

It is consequently apparent that the effect of the decision here will be to subject the entire accounts, plants, and almost all of the affairs of many large companies to the jurisdiction of the Commission merely because *small parts of their* facilities are connected with lines which are connected with other lines which in turn are connected with generating plants outside of the State, and that it will also subject to the jurisdiction of the Commission innumerable small companies which happen to be so connected, even though none of the rates of such companies (large or small) is subject to the jurisdiction of the Commission. It is hard to conceive of a holding which would have a wider effect upon the scope of the jurisdiction of the Commission and which would impose greater trouble or expense upon utility companies.

2. The net effect of the holding of the Court below conflicts, as a practical matter, with the principle stated in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 72, *supra*, that "mere connection determines nothing".

3. The decision of the Court below conflicts with the view

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[10] Section 308(b).
[11] Section 304(a).
[12] Section 302(a).
[13] Section 203(a).

of the Circuit Court of Appeals for the Third Circuit as expressed in the following language from its opinion in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 129 F. 2d 183, 194:

> "As we have said Section 201(a) of the Act states explicitly that the federal regulation proposed by the Act is intended 'to extend only to those matters which are not subject to regulation by the States', and that Section 201(b) says with equal clarity that *the Commission 'shall not have jurisdiction* • • • over facilities used for the generation of electric energy or *over facilities used in local distribution* or only for the transmission of electric energy in intrastate commerce, • • •.' Generation of electricity, *its local distribution* or its transmission in intrastate commerce are not within the purview of the Act or the jurisdiction of the Commission." [Italics ours]

4. The decision of the Court in this case that interstate commerce was carried on over the facilities of Petitioner is in conflict with the decisions of this Court in *Public Utilities Comm.* v. *Landon*, 249 U.S. 236; *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298; *Lone Star Gas Co.* v. *Texas*, 304 U.S. 224; and *Banker Bros. Co.* v. *Pennsylvania*, 222 U.S. 210. In holding that the transformation of the energy and division of the same for local distribution did not terminate the interstate journey of the energy, the decision below is also in conflict with that in *South Carolina Power Co.* v. *South Carolina Tax Commission*, 52 F. 2d 515, aff'd 286 U.S. 525; 60 F. 2d 528, aff'd *sub nomine Broad River Power Co.* v. *Query*, 288 U.S. 178.

5. Construction and application of the statute as requiring appellate courts merely to ascertain whether there was substantial evidence to support the findings as to jurisdictional facts conflicts with *Crowell* v. *Benson*, 285 U.S. 22; *St. Joseph's Stock Yards Co.* v. *United States*, 298 U.S.

38, 51-52; and *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C.C.A. 5th), cert. den. 299 U.S. 559.

WHEREFORE it is respectfully submitted that the petition should be granted.

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JUNE, 1944.

In the

Supreme Court of the United States.

OCTOBER TERM, 1943.

No.

THE CONNECTICUT LIGHT AND POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

For statement of the case and also statements as to the opinions below, jurisdiction, questions presented, statute involved, and specification of errors, we refer to the foregoing petition. Some further statements of fact are made in the argument in this brief.

In *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, this Court said:

> "* * * The language of section 201(a) and (b) indicates a distinction between the facilities for generation or production and those for transmission. Also, it is sales at wholesale only which are regulated and, finally, Commission power does not extend over all connecting transmitting facilities but only over those *which transmit energy actually moving in interstate*

commerce. Mere connection determines nothing. [*Italics ours.*]

* * * * * * *

"* * * The business of transmitting and selling electric energy is said to be affected with a public interest and federal regulation of a portion of that business is declared necessary. Section 201(a). The fact that a company is engaged in this business is not determinative of its inclusion in this act. The determinative fact is the ownership of facilities used in transmission. Such use makes the owner or operator of such facilities a public utility under the act (e). * * *"

The problem, then, is to determine whether Petitioner had facilities of the kind which the statute prescribes as the basis of its jurisdiction.

ARGUMENT.

A.

PETITIONER HAS OWNED OR OPERATED NO FACILITIES SUBJECT TO THE JURISDICTION OF THE COMMISSION IN ANY OF THE THREE AREAS WHICH WERE CONNECTED WITH THE C.P. LINES, i.e., EAST HAMPTON, BRISTOL OR TORRINGTON-WINSTED.

As to each of these areas Petitioner was a distributing company which did not itself transmit energy interstate, but which purchased for local retail distribution energy which came to it over the C.P. lines owned by the Connecticut Power Company, and some of this energy, according to findings of the Commission, the Connecticut Power Company had transmitted from Massachusetts.

As we have pointed out, contracts called for a supply from these three districts from generating plants in Connecticut and since the billing to Petitioner was based on

production cost at a steam generating plant in Hartford, Connecticut, Petitioner had no reason to concern itself with any possible flow of energy from Massachusetts. At no time were the combined loads of Petitioner in these districts greater than the amount generated contemporaneously by plants in Connecticut with which these loads were connected.

We contend that all of the purposes of the Act are fulfilled if, as here, the company which did transmit energy across the State line, i.e., the Connecticut Power Company, is subject to the jurisdiction of the Commission, and that it was not the intention of Congress to submit a local distributing company to the jurisdiction of the Commission merely because the supply which it purchased and received in the State and used in local distribution there happened to include some energy generated in another State.

I.

NO FACILITIES OF THE PETITIONER IN THESE AREAS WERE FACILITIES "FOR THE TRANSMISSION OF ELECTRIC ENERGY IN INTERSTATE COMMERCE" WITHIN THE MEANING OF THE ACT.

Section 201(a) of the Act stipulates that the Federal regulation which the Act confers is "to extend only to those matters which are not subject to regulation by the States". In the report of the Committee on Interstate Commerce submitted to the Senate by Senator Wheeler (Senate Report No. 621, 74th Congress, First Session, p. 18) it is stated:

> ". . . The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States."

As appears from the legislative history of the Act, the ultimate purpose of Congress was to confer upon the Commission jurisdiction over transactions and facilities which

had been held to be beyond the reach of State power, as Congress understood the decision in *Attleboro Steam & Electric Co.* v. *Public Utilities Commission*, 273 U.S. 83. Clearly, Congress did not intend to submit to the jurisdiction of the Commission all facilities connected to "parts of a system of power transmission situated in more than one State" for the bill as it originally passed the Senate contained such a phrase, but this was deliberately changed, and in the bill as finally passed those words were intentionally omitted. The legislative history of the Act is set forth in some detail in the dissenting opinion in *Jersey Central Company* v. *Federal Power Commission*, 319 U.S. 61, 85-88, and in *Jersey Central* v. *Federal Power Commission*, 129 F. 2d 183, 193-194, to which for convenience we hereby refer.

We contend that, regardless of all other considerations, transmission in interstate commerce ended at least as soon as the energy reached the facilities of Petitioner, and consequently the facilities of Petitioner did not transmit energy moving in interstate commerce.

As Petitioner was a distributing company which did not itself transmit energy interstate, the situation here is like that discussed in *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 308, in which the Court, speaking of the transportation of gas in a pipe line across a state line and delivery to distributing companies which then sold and delivered it to local customers, said: "With the delivery of the gas to the distributing companies, however, the interstate movement ends." In that case the Court also said (p. 309): "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; * * *"

The situation here is also similar to that presented in such cases as *Lone Star Gas Co.* v. *Texas*, 304 U.S. 224;

South Carolina Power Co. v. *South Carolina Tax Commission*, 52 F. 2d 515 (E.D. S.C. 1931), aff'd 286 U.S. 525; 60 F. 2d 528, aff'd *sub nomine Broad River Power Co.* v. *Query*, 288 U.S. 178; *Public Utilities Comm.* v. *Landon*, 249 U.S. 236; *Banker Brothers Co.* v. *Pennsylvania*, 222 U.S. 210. See also *Southern Gas Corp.* v. *Alabama*, 301 U.S. 148, 154-155.

The companies which contracted to supply those loads of Petitioner which were connected with the C.P. lines (*i.e.*, those in the three districts under discussion) have at all times been able to obtain the necessary supply from generating plants located in Connecticut. (R. 949-953, 969-972)

Consequently, it is clear that the State Commission had jurisdiction over those contracts and over all of the facilities of Petitioner in those areas. *Peoples Gas Co.* v. *Pub. Serv. Com.*, 270 U.S. 550; Connecticut G. S. Rev. of 1930, Section 3599*; *New Haven* v. *New Haven Water Co.*, 118 Conn. 389, 172 A. 767.

As appears from the language of the Act itself and its legislative history, Congress intended to preserve jurisdiction of the state over such contracts and such facilities and

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*In this connection attention is called to Section 1414(c), Cumulative Supplement to General Statutes of Connecticut. This Act, which was approved and became effective on May 29, 1935, as Chapter 191 of the Public Acts, 1935, states that its general purposes "are to assure to the State of Connecticut its full power to regulate its public service corporations", etc.

Section 6 of this Chapter [Cumulative Supplement (1935) 1414(c), cl. f, p. 592] contains the following provision:

> "• • • No gas, electric or water company, or holding company, or any official, board or commission purporting to act under any governmental authority other than that of this state or of its divisions, municipal corporations or courts, shall interfere with or attempt to interfere with or exercise authority or control over any gas, electric or water company incorporated by this state and engaged in the business of supplying service within this state, or with or over any holding company

not to bestow jurisdiction over the contracts or the facilities upon the Federal Power Commission.

Another reason why the interstate movement of any electric energy coming from Massachusetts had ceased before it reached Petitioner's facilities in the East Hampton and Torrington-Winsted areas is that before reaching them it had been transformed and divided for local distribution. (R. 689-690, 699-700)

It has been held where electric energy is transmitted into a state and put through a transformer in order to render the energy suitable for local customers that the effect of a transformer is to terminate the interstate journey of the energy. *South Carolina Power Co.* v. *South Carolina Tax Commission*, 52 F. 2d 515, at pp. 524-525; aff'd 286 U.S. 525.

The transformer involved in that case evidently operated in the same manner as those here involved, as transformers have not changed in principle in recent years. (R. 616)

The transformers here involved lowered the tension and "converted and reshaped" the energy "so as to give it new characteristics." (R. 614, 874-877) The treatment of the energy in passing through them is consequently similar to the treatment and division of a large compressed volume of gas when it is relieved of most of the pressure put upon it, and it is consequently, as the Court said in *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, 471: "like the breaking of an original package, after shipment in in-

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incorporated by this state and doing the principal part of its business within this state, without having first obtained the approval of the commission, except as the United States may properly regulate actual transactions in interstate commerce. Any action contrary to the provisions of this section shall be voidable on order of the commission."

terstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."

The fact that the journey of electric energy from generator to consumer is virtually instantaneous does not determine the question whether energy is in interstate or intrastate commerce at any given point in that journey. As the Court said in *Southern Pacific Company* v. *Gallagher*, 306 U.S. 167, 177: "'Practical continuity' does not always make an act a part of interstate commerce." And the Courts have had no difficulty in dividing the journey of electric energy for jurisdictional purposes. See *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165, 179; *South Carolina Power Co.* v. *South Carolina Tax Commission*, 52 F. 2d 515, 524-525.

II.

THE FACILITIES OWNED OR OPERATED BY PETITIONER IN THESE THREE AREAS WERE "FACILITIES USED IN LOCAL DISTRIBUTION", AND THEREFORE WERE EXEMPT FROM THE JURISDICTION OF THE COMMISSION.

Section 201 (b) of the Federal Power Act provides:

> ". . . The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."*

We contend that whether or not any facilities of Petitioner were facilities "for transmission of electric energy

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*Act of August 26, 1935, C. 687 (49 Stat. 847), U.S.C. Title 16, § 824(b).

in interstate commerce", they were "used in local distribution" and therefore Petitioner was exempt from the jurisdiction of the Commission.

The Commission seems to have recognized in its opinion that certain facilities would be exempt under the language of the statute quoted above. This is apparent from the discussion in its opinion (R. 75-78) and the fact that it made specific findings as to which facilities in each of the three areas it regarded as "used for the transmission of electric energy * * * as distinguished from local distribution thereof." See paragraphs (10), (14), and (18) of the findings. (R. 66-69)

The discussion in that opinion and the findings show, however, that the Commission took too narrow a view of the scope of the exemption of facilities "used in local distribution", which it confined to facilities in the system beyond the point where "the process of subdividing the energy to serve ultimate customers, which [it said] is the characteristic of 'local distribution', is begun." (R. 75) Thus it excluded from the excepted category various facilities of Petitioner beyond the point where it received the electric energy from the Connecticut Power Company, and classified as facilities not used for local distribution not only certain lines between Torrington and Winsted and in the East Hampton area, but also the substations in those areas which lowered the voltage, and also the facilities in the substation in the heart of Bristol. (R. 66-69)

In the Court of Appeals Petitioner contended that the Commission in reaching these conclusions erred as a matter of law in construing the statute, and also that insofar as its findings are findings of fact they were not sustained by the weight of the evidence, as to which the Court must make its own independent determination.

Petitioner contended that as a matter of law the excep-

tion must be construed as embracing all the facilities owned by it beyond the point of delivery of the electric energy to it as a distributing company and, in the alternative, that if such a definition of the term "used in local distribution" is not warranted, this phrase must include all facilities whose functions are intimately connected with distribution. Certainly the phrase is no narrower than the one making the exception immediately following in the statute, *i.e.*, facilities "only for the transmission of electric energy in intrastate commerce." Whatever may be the power of Congress to place under the jurisdiction of a Federal agency facilities such as the local facilities under discussion, here Congress did not attempt to include the facilities which were only incidentally connected with interstate commerce. It seems clear that it did not intend to submit to Federal jurisdiction facilities beyond the point where the interstate movement ended under the concept of interstate commerce which was in effect at the time of the passage of the Act in 1935.

The Court below, however, declined to consider any of these contentions. It held that Petitioner's contention that jurisdiction over accounts and the like could not be based solely upon facilities in local distribution was unsound, and that the language of the Act quoted above did not operate as an exemption, but was "intended to make it clear that this jurisdiction extends even to local facilities where the Act provides for their regulation, as it does in the case of accounting practices", and went on to say, "Therefore, whether or not the facilities by which petitioner distributes energy from Massachusetts should be classified as local is not relevant to this case." (R. 1175)

The Court admitted that the construction for which Petitioner contended was a "grammatical possibility", but based its conclusions upon considerations which, we sub-

mit, totally lost sight of the structure of the Act and its legislative history.

The provision for "accounting practices", on which the Court relied, cannot of itself submit facilities of a company or its accounts to the jurisdiction of the Commission. This provision appears in Section 301 of Part III. But in determining whether the Commission has any jurisdiction over a company, Part III does not control, inasmuch as Section 201(e) in Part II provides:

> "The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under *this* Part." (Emphasis ours)

Facilities for local distribution are nowhere specifically mentioned in other sections of "this Part", *i.e.*, Part II of the Act. Thus it is clear that Petitioner is not a "public utility" subject to the jurisdiction of the Commission solely because facilities used in local distribution may be governed by the accounting requirements applicable to a "public utility".

The matter is definitely and clearly summarized in the extract from the opinion in *Jersey Central Power & L. Co.* v. *Federal Power Commission*, 129 F. 2d 183, 194, quoted on p. 16, *supra*.

The legislative history of the Act demonstrates clearly that Congress did not intend to extend Federal jurisdiction to all facilities connected to "parts of a system of power transmission situated in more than one state" (from which the original bill excepted facilities for "retail distribution"),* that continual efforts were made to narrow the basis of jurisdiction originally proposed, and that the ultimate intention was to exclude "facilities used in local dis-

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*S. 1725, 74th Cong. 1st Sess., February 6, 1935.

tribution" from the categories of facilities subjecting a company to the general jurisdiction of the Commission.

The provision for jurisdiction over facilities in Section 201(a) of the Bill as reported to the Senate by the Senate Committee (designated S. 2796) and as the Bill passed the Senate was as follows:

> "The Commission shall have jurisdiction over all facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter."*

This, it is clear, specifically excepted from the jurisdiction of the Commission "facilities used in local distribution".

The House Committee on Interstate and Foreign Commerce rewrote certain provisions of the Bill and reported it to the House (S. 2796 with amendments, Report No. 1318, House of Representatives, 74th Congress, 1st Session). As so reported, the clause applying to "facilities used in local distribution" was the same as in the Act finally passed, except that it did not contain the words "except as specifically provided in this Part and the Part next following." The House enacted the clause as reported.

It is clear that the House did not intend to confer jurisdiction of the Commission over a company because of ownership of facilities used in local distribution. The Re-

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*Jersey Central Power & L. Co. v. Federal Power Commission, 129 F. 2d 183, 193.

port of the House Committee contained the following language (p. 27):

> "As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State."

Throughout the discussion on the floor of the House there appear abundant manifestations of Congressional purpose to preserve to the States the powers which they then had. See 79 Cong. Rec. Part 9, pp. 10357, 10377, 10378, 10384-10387, and Part 10, 10574.*

Owing to the differences between the bills passed by the two Houses, the matter was referred to conferees.

They inserted the phrase "except as specifically provided in this Part and the Part next following." This is the first time this phrase appears, and the Report of the House conferees accompanying the Conference Report (74th Congress, 1st Session, House Report No. 1903, p. 74) asserts that it is merely "a clarifying phrase added to remove any doubt as to the Commission's jurisdiction over facilities used for the generation and local distribution

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*Moreover, when the Federal Power Act was under discussion upon the floor of the House, Representative Cole of Maryland, a member of the Committee on Interstate and Foreign Commerce, said of the provisions of Part II that the Committee had "tried—and I think successfully—to avoid . . . the extension thereof [of Federal control] into intrastate activities in the way that the Shreveport case might permit." 79 Cong. Rec. Part 9, 10384.

The familiar doctrine of the Shreveport case (*Houston, East & West Texas Railway Co.* v. *United States*, 234 U.S. 342) is that the Interstate Commerce Commission can properly regulate intrastate railroad rates where they are so low as to discriminate against and work direct injury to interstate commerce. That is the doctrine which Congress intended should *not* be applied in interpreting the powers of the Federal Power Commission.

of electric energy to the extent provided in *other* sections of this part and the part next following." (Emphasis ours) In the light of this statement and the fact that there was no dispute between the House and the Senate as to the provision regarding local distribution, it is clear that this clause was not intended to enlarge the basis of general jurisdiction of the Commission as previously limited.

As we have pointed out above, in determining the general jurisdiction of the Commission the Part next following, *i.e.*, Part III (in which the accounting provisions appear) must be disregarded.

III.

THE COURT BELOW ERRED IN REFUSING TO WEIGH THE TESTIMONY AS TO JURISDICTIONAL FACTS.

Petitioner contended in the Court below that the findings of the Commission to the effect that Petitioner purchased electric energy for three areas connected with C.P. lines which "regularly, frequently and over substantial periods of time" included electric energy in substantial amounts transmitted from Massachusetts could not stand.

As facilities are not subject to the jurisdiction of the Commission unless they transmit "energy actually moving in interstate commerce", it follows that unless it is proved that energy from outside of the state did reach Petitioner's facilities they are not subject to the jurisdiction of the Commission.

Section 313(b) of the Federal Power Act provides, "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

In this connection it should be borne in mind that it is expressly stipulated in Section 313(b) of the Federal Power Act, which provides for review by the Courts, that upon the filing of the transcript therein, "such court shall have exclusive jurisdiction to affirm, modify or set aside

such order, in whole or in part", and that the statute contains no other provision for challenging the order of the Commission or any finding of fact upon which it is based.*

The statute should not be construed in such a way as to raise grave doubt as to its constitutionality. If the statute be construed to require the reviewing courts merely to ascertain whether there was some substantial evidence to support the findings as to *jurisdictional facts*, leaving Petitioner without any independent judicial review of these facts, it would be unconstitutional. See *Crowell* v. *Benson*, 285 U.S. 22, and other cases cited in the petition.

In the Court below we made these contentions, but the Court entirely disregarded them and said merely that the question was whether the finding of the Commission was sustained by substantial evidence. A petition for rehearing again set forth these contentions. (R. 1180-1181) The petition was, however, denied without opinion. We submit that the decision of the Court below on this point conflicts with the cases cited and that this is sufficient reason for granting certiorari and reversing the decree of the Court below. Although it does not seem desirable here to discuss the evidence in detail, we wish to point out that the Court below seems to have misunderstood the evidence and our contentions in regard to the evidence.

Thus the opinion states that the statute "makes the test of whether such energy is actually transmitted between the two States the simple and practical one of reading a meter" (R. 1176), but the evidence demonstrated clearly that in the situation which obtained here the reading of a meter would not show the source of the energy.

The facilities of the Petitioner in question were at all times connected with generating plants in Connecticut

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*Act of August 26, 1935, C. 687 (49 Stat. 860), U.S.C. Title 16, § 825*l*(b).

which contemporaneously generated more than the combined loads of these three areas of the Petitioner. (R. 949-953) As the engineer of the Commission admitted, there were no meters which showed the source of the energy which reached the facilities of the Petitioner.* The generating plants in Connecticut were nearer these loads of the Petitioner than were the generating plants in Massachusetts. (See R. 1113) In these circumstances we contend

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*The following are extracts from the testimony of the Commission's engineer, Thomas (R. 601-603):

"Q. Now, I think that you testified in effect that there were instruments for determining the flow of energy and the rate of flow that you designated as watt-meters or watt-hour meters; is that correct? A. I remember stating that.

"Q. Such meters, of course, do not show the source of the energy, do they? A. Well, the meter itself doesn't have a marking on it to show where it came from. In Mr. Miller's case, the meter doesn't show red and blue or anything of that sort.

"Q. And of course there is not at Bristol or Winsted or any of the East Hampton District any instrument which shows the source of the energy that was received there at any time? A. No, not that you can determine from the reading on the instrument.

"Q. And as a matter of fact it is impossible by examining or by any other observation that you can make of energy at a particular point, to know where it is generated? A. I think that is correct.

• • •

"Q. Let me ask you a specific question. Let us assume that there is energy put on the CP line No. 1 from Falls Village, and there is also energy put on that line from Hartford. There is no physical observation or no reading of any meter on that line that would enable you to determine at any particular point what proportion of the energy came from one source and what from the other? A. Well, the instruments that are put on the line are only intended to read the total. So, of course—

"Q. And the— A. So, of course, they wouldn't indicate parts. They are not intended for that purpose."

that, as distinguished experts testified, there was no established principle by which energy reaching the facilities of the Petitioner could be identified as coming from Massachusetts. (R. 772-776, 864-865, 873)

We did not suggest, as the opinion implies, that there was any "distinction between electric current as measured on a meter and electric energy * * * within the contemplation of Congress when it passed the Act."

B.

PETITIONER WAS NOT SUBJECT TO THE JURISDICTION OF THE COMMISSION BECAUSE OF ANY SALE MADE TO THE BOROUGH OF GROTON OR FACILITIES FOR TRANSMISSION IN CONNECTION THEREWITH.

Petitioner has sold electric energy at wholesale to the Borough of Groton, a municipal corporation in Connecticut. This Borough has the charter right to carry on the business of distributing power within certain limits. (Finding, R. 64; see also R. 168, 169, 171-173, 180; Ex. 77, R. 1148)

After delivery of the energy to the Borough of Groton, some of it was distributed to numerous customers of the Borough located on its distribution system in Connecticut. Some of the rest was transformed from 33,000 volts, at which it was delivered, to 6600 volts at a substation owned by the Borough and then at another substation owned by the Borough some of it was transformed to 2300 volts. Part of the energy going to this point was distributed to local customers in Connecticut and the rest went to a substation connected with cables going to Fishers Island, New York. None of the facilities between the substation first mentioned and Fishers Island was owned by Petitioner. (R. 100-101, 180-182, 199-203, 206, 532-533)

The energy purchased by the Fishers Island Company* from the Borough amounted to about one-third of the total amount of energy purchased by the Borough from Petitioner, but to only about 1/5 of 1% of all of the energy supplied by Petitioner in each year to all of its customers. (R. 216, 834-835)

The energy was purchased by the Borough of Groton from Petitioner under contracts which made no mention of sale of the energy by the Borough to the Fishers Island Company, but Petitioner knew that some of the energy was being supplied by the Borough to the Fishers Island Company. (R. 93-107, 193)

In February, 1941, prior to the hearing before the Commission, connections were cut and facilities were dismantled so that transmission to Fishers Island was no longer possible. (R. 196-197, 209-215, 608)

We submit that the sales to Groton and the facilities used in connection therewith did not submit Petitioner to jurisdiction of the Commission for three distinct reasons.

I.

THE INTERSTATE MOVEMENT TO FISHERS ISLAND DID NOT BEGIN UNTIL AFTER THE ENERGY LEFT THE FACILITIES OF PETITIONER AT GROTON.

As has been pointed out above, in Groton, Connecticut, the energy was greatly reduced in voltage by transformers owned by the Borough and was subdivided extensively for local distribution. It was only after it had passed through these transformers and various other facilities of the Borough that it was delivered to Fishers Island Company and then transmitted by that company to New York.

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*"Fishers Island Company" is employed throughout this brief to denote the corporation engaged at the corresponding period of time in purchasing electric energy from the Borough of Groton for supply to Fishers Island.

We consequently submit that under the principles mentioned on pp. 24-25, *supra*, the interstate movement cannot be considered as beginning until after the energy left the facilities of Petitioner in Groton.

II.

THE AMOUNT OF ENERGY WHICH WAS TRANSMITTED TO FISHERS ISLAND WAS SO NEGLIGIBLE THAT IT MUST BE DISREGARDED.

The territory served directly by Petitioner covers a substantial part of the State of Connecticut. It serves electric energy in 107 towns, cities, and boroughs, which have a total population of abut 660,000, not including about 130,000 served by other Connecticut utilities purchasing substantially all of their electrical requirements from Petitioner. (R. 86-87)

The amount of energy which was transmitted to Fishers Island was only about 1/5 of 1% of all the energy generated and received by Petitioner. But if the sales to Groton or the transmission facilities used in them are held subject to the jurisdiction of the Commission, the result is not merely to submit these particular sales and facilities to the jurisdiction of the Commission, but, as pointed out in the foregoing petition, to submit a very large part of the activities of Petitioner's entire business to the jurisdiction of the Commission. Among other things this will require compilation of an inventory of all of its property with a statement of the original cost thereof, a tremendous undertaking which it is estimated will involve an expense of about $400,000.

It is incredible that Congress intended to give the Commission such jurisdiction over a company because it had facilities which were used in connection with such an infinitesimal part of its business. The Court in the *Jersey Central* case appears to have recognized that the *de mini-*

is rule might be applicable to such a situation. (Footnote of the majority opinion.)

The Court below also seemed to recognize that the *de minimis* rule might be applicable to such a situation, but it refused to apply it because it concluded that the history of Petitioner's operations removed all doubt as to its "essentially interstate character", and indicates that the business of Petitioner was not normally an intrastate business.

This, we submit, reveals a complete misunderstanding of the nature of Petitioner's business. Although prior to the passage of the Act some of its generating plants were connected with lines which transmitted energy to Massachusetts, the production of energy for use in Massachusetts was only a small part of the business of Petitioner, which generated large amounts of energy and transmitted them from its generating plants to about 100 towns, cities, and boroughs which it served with electricity. Before the Act went into effect, the connection of its generating plants with the lines going to Massachusetts was severed, and after that if Petitioner was engaged in interstate business at all it was only because of the extremely small amount of energy supplied indirectly to Fishers Island, New York, and because of the fact that some of the energy which it received from the Connecticut Power Company happened to come from sources in Massachusetts, although Petitioner contracted for no energy from such sources.*

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*As indicated above, Petitioner had no occasion to determine whether any electric energy was received from Massachusetts, and we contend that it has not been shown that it did receive such energy after the Act went into effect in 1935.

III.

THE FACT THAT THE BOROUGH OF GROTON IS A MUNICIPAL CORPORATION PREVENTS SALES OF PETITIONER TO IT FROM SUBJECTING PETITIONER TO THE JURISDICTION OF THE COMMISSION.

Section 201(b) of the Act confers jurisdiction over "the sale of electric energy at wholesale in interstate commerce . . .", and Section 201(d) defines the term "a sale of electric energy at wholesale" as meaning "a sale of electric energy to any *person* for resale". (Italics ours.) Subsection (4) of Section 3 defines "person" as "an individual or a corporation", and subsection (3) of Section 3 defines "corporation" as not including "municipalities as hereinafter defined." Subsection (7) of Section 3 defines municipality as a "political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

Moreover, Section 201(f) contains the following:

> "No provision of this part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State * * * unless such provision makes specific reference thereto."

The Borough of Groton is a municipal corporation and as such, of course, is a political subdivision of a state. It has authority to distribute power.

The words of the statute seem clear. Accordingly, we submit that the sales to Groton are not sales of the character which submits facilities used in connection therewith to the jurisdiction of the Commission.

The cases cited in the opinion of the Commission (R. 78) state that it must be contemplated that a municipality has the right to have the Commission supervise its contracts with companies selling to it at wholesale, in view of the provisions of Sections 306 and 313, which give munici-

palities the right to complain to the Commission, to apply for a rehearing, and to obtain a review in court. The reasoning is that the only sales over which the Commission has jurisdiction are sales at wholesale and consequently the only sale in which a municipality would be seriously interested would be a sale direct to the municipality. We submit that further consideration of the Act will demonstrate that this is not so.

Thus the provisions in Sections 306 and 313 give rights to "any person, State, municipality or State commission." Obviously, the rights of a state commission to be heard are not predicated upon or limited to sales to a state commission, because such sales could hardly have been contemplated. It seems manifest that official bodies, such as municipalities, municipal commissions, and state commissions, are given certain rights in respect of transactions to which they are not parties but in which they may feel they should represent some public interest. A municipality might desire to institute a complaint or participate in a controversy involving wholesale rates to a company serving its inhabitants.

It is also significant that Sections 306 and 313 apply to all parts of the Act. In this connection it is noteworthy that licenses to construct dams and the like may be issued to municipalities under Section 4(e), and that numerous other provisions of the Act are applicable to municipalities. Among these are 4(f), 7(a), 10(c), 10(e), 14, 19, 23(b), 301, 302, and 304. For Code references see U.S.C. Title 16, § 797(f); 800(a); 803(c); 803(e); 807; 812; 817; 825; 825(a); 825c.)

It is consequently evident that there is ample scope for applying the provisions of Sections 306 and 313 to a municipality without construing them as overriding the language of Sections 201(d) and (f).

The opinion of the Commission also states that as this

contention "is based solely upon the definitions of 'sale at wholesale', it obviously cannot apply to 'transmission in interstate commerce', even though such transmission is to a municipality." (R. 78)

But we submit that under no reasonable interpretation would the statute exclude the facilities of a company from the jurisdiction of the Commission because related to a sale to a municipality and at the same time nullify the exclusion by subjecting the seller to jurisdiction because of the transmission connected with such sales. Obviously the sales from the Borough to Fishers Island Company are beyond the jurisdiction of the Commission. It seems clear that Congress intended to deny the Commission jurisdiction over anything based upon purchases by a municipality or sales by a municipality. If the transaction with the municipality is beyond the jurisdiction of the Commission, there is no reason for it to have jurisdiction over facilities merely because they were connected with such a sale.

C.

THE COURT BELOW ERRED IN CONSIDERING THAT PETITIONER'S BUSINESS WAS "ESSENTIALLY INTERSTATE."

The decision of the Court seems to be based largely upon its conclusion that the system of Petitioner was "essentially interstate" and not "normally intrastate". We submit that in coming to this conclusion the Court committed fundamental errors.

The Court stresses the fact that Petitioner terminated its membership in the Connecticut Valley Power Exchange, an association for the interchange of electric energy between Connecticut and other States, before the effective date of the amendment to the Act, and that it severed certain connections after that time. The Court states that the

character of Petitioner's system can be judged from its activities and discontinuance of activities before the amendment to the Act went into effect.

The reasoning of the Court is subject to two criticisms.

In the first place, the evidence does not show what part of the business of Petitioner was involved in its participation in the Connecticut Valley Power Exchange. As a matter of fact, it was a comparatively unimportant part of the business of Petitioner. In our view of the case, this was immaterial. Certainly it was improper for the Court to assume, in the absence of evidence, that its participation in this Exchange rendered the business essentially an interstate business. As we have pointed out elsewhere, Petitioner had an extensive system by which it distributed energy to 107 towns, cities and boroughs in Connecticut, and undoubtedly most of the energy which it generated was used in the State. As far as we know, no study was ever made to determine how much, if any, energy from outside of the State could be regarded as coming to Petitioner's facilities prior to the effective date of the amendment.

There was no evidence that any of the facilities of Petitioner was constructed with a view to receiving energy from, or sending energy to, points outside of the State; and the fact is that none of the facilities was constructed with either of these aims in view.

The severance of connections after the effective date of the Act involved only a very small part of Petitioner's business. Only about 1/5 of 1% of all of the energy in which Petitioner dealt went to Fishers Island.

Only a very small percentage of all of the energy in which Petitioner dealt could have come from outside the State to its three areas connected with lines of the Connecticut Power Company. A small percentage of the total amount of all such energy came from the Connecticut

Power Company to these three areas.* There is no evidence at all as to what part of the energy coming to these places from the Connecticut Power Company came from outside the State, assuming that the conclusions of the Commission's engineers on this matter are sound and that some energy from Massachusetts did reach Petitioner's facilities. Their studies went no further than to show that out-of-State energy was received during a few hours in the period involved and most of those were hours when the loads of Petitioner were small. (R. 454-455; 543-557; Ex. 85, R. 1150-1151)

The second criticism of the reasoning of the Court is that it bases jurisdiction not upon what Petitioner is doing, but largely on what Petitioner did before the Act took effect. But as the Court said in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 72, the Commission's power extends only over facilities "which transmit energy actually moving in interstate commerce" and "the determinative fact is the ownership of facilities used in transmission."

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*The record does not show exactly what percentage came from the Connecticut Power Company, but from the figures in evidence it is possible to make calculations which give some idea of the situation. The total amounts of energy dealt in by Petitioner appear at R. 835. The total amounts received in the East Hampton district appear at R. 41, and a comparison of these figures shows that the amount purchased from Connecticut Power Company for this district was about ½ of 1% of all of Petitioner's energy. The total amount purchased for Bristol was approximately 7%. (R. 837) The Torrington Company purchased from Connecticut Power Company amounts shown at R. 400. These amounts, of course, included energy which the Torrington Company used itself in its own system. The total amounts which it purchased from the Connecticut Power Company came to about 4% of all of the total amounts used by Petitioner in its entire business. The figures given in this footnote relate to total purchases from the Connecticut Power Company, and a large part of this must have come from sources within the State.

Obviously, the Commission could not acquire jurisdiction over any of Petitioner's facilities unless they were facilities over which the energy actually moved in interstate commerce after the effective date of the Act. We submit that its status must be determined by conditions which actually existed at the times when jurisdiction is asserted, not by what had happened prior to that time—and certainly not by what happened prior to the effective date of the Act.

Respectfully submitted,

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JUNE, 1944.

APPENDIX.

STATUTES INVOLVED.

FEDERAL POWER ACT.

Act of August 21, 1935, C. 687, Title II (49 Stat. 838).

PART I—REGULATION OF THE DEVELOPMENT OF WATER POWER AND RESOURCES

SECTION 3.[1] The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

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(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

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PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Declaration of Policy; Application of Part; Definitions.

SECTION 201. (a)[2] It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest,

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[1] 49 Stat. 838, U.S.C. Title 16, § 796.

[2] 49 Stat. 847, U.S.C. Title 16, § 824(a).

nd that Federal regulation of matters relating to genera-
on to the extent provided in this Part and the Part next
llowing and of that part of such business which consists
f the transmission of electric energy in interstate com-
erce and the sale of such energy at wholesale in interstate
ommerce is necessary in the public interest, such Federal
egulation, however, to extend only to those matters which
re not subject to regulation by the States.

(b)[3] The provisions of this Part shall apply to the trans-
ission of electric energy in interstate commerce and to
he sale of electric energy at wholesale in interstate com-
erce, but shall not apply to any other sale of electric en-
rgy or deprive a State or State commission of its lawful
uthority now exercised over the exportation of hydro-
ectric energy which is transmitted across a State line.
he Commission shall have jurisdiction over all facilities
or such transmission or sale of electric energy, but shall
ot have jurisdiction, except as specifically provided in this
art and the Part next following, over facilities used for
he generation of electric energy or over facilities used in
ocal distribution or only for the transmission of electric
nergy in intrastate commerce, or over facilities for the
ransmission of electric energy consumed wholly by the
ransmitter.

(c)[4] For the purpose of this Part, electric energy shall
e held to be transmitted in interstate commerce if trans-
itted from a State and consumed at any point outside
hereof; but only insofar as such transmission takes place
ithin the United States.

(d)[5] The term "sale of electric energy at wholesale"

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[3] 49 Stat. 847, U.S.C. Title 16, § 824(b).

[4] 49 Stat. 848, U.S.C. Title 16, § 824(c).

[5] 49 Stat. 848, U.S.C. Title 16, § 824(d).

when used in this Part means a sale of electric energy to any person for resale.

(e)[6] The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f)[7] No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

* * * * * * * * * *

PART III—LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS.

Accounts, Records, and Memoranda.

SECTION 301. (a)[8] Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with

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[6] 49 Stat. 848, U.S.C. Title 16, § 824(e).

[7] 49 Stat. 848, U.S.C. Title 16, § 824(f).

[8] 49 Stat. 854, U.S.C. Title 16, § 825(a).

respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

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Rehearings; Court Review of Orders.

SECTION 313. (a)[9] Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any per-

[9] 49 Stat. 860, U.S.C. Title 16, § 825*l*(a).

son unless such person shall have made application to the Commission for a rehearing thereon.

(b)[10] Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

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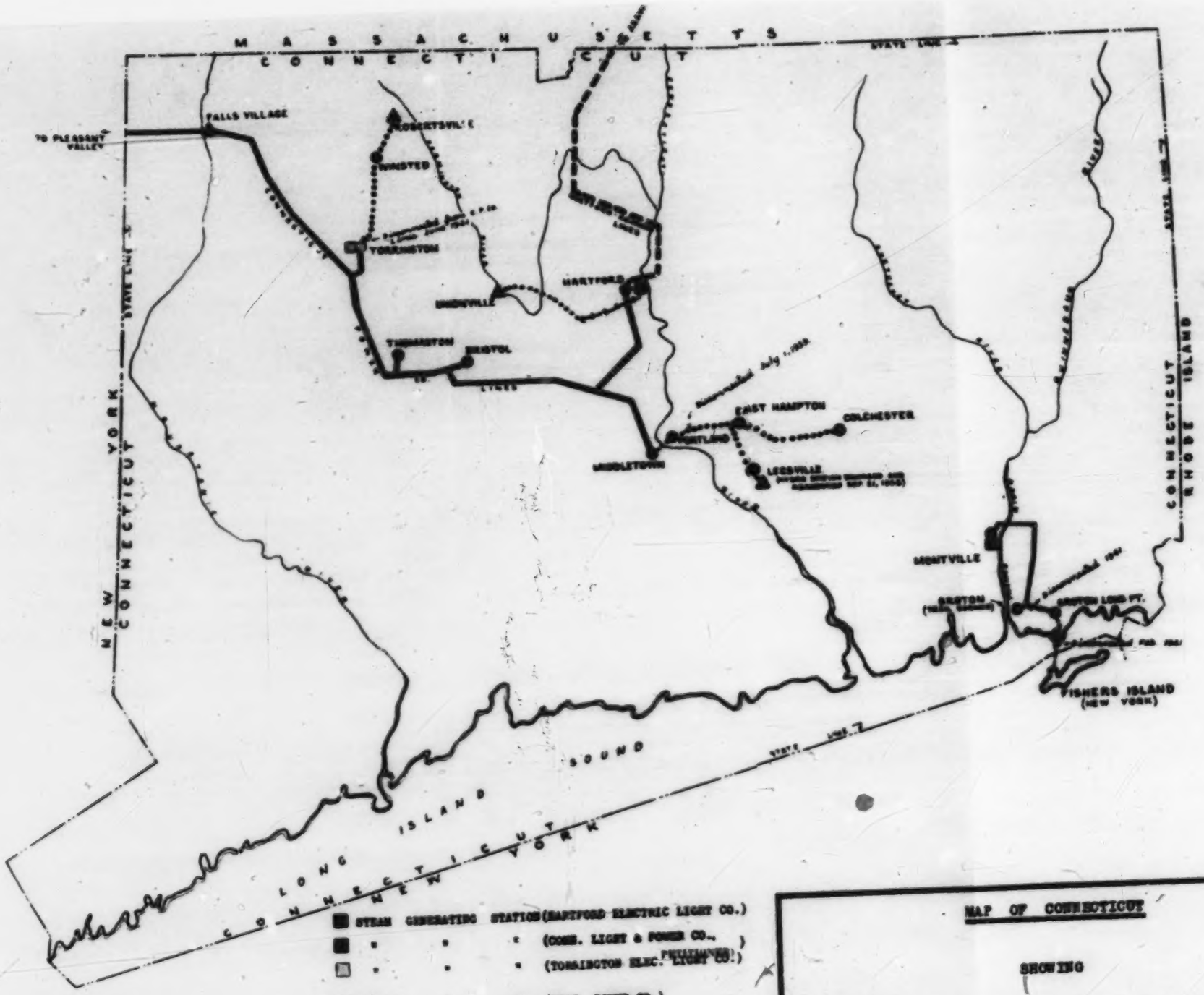
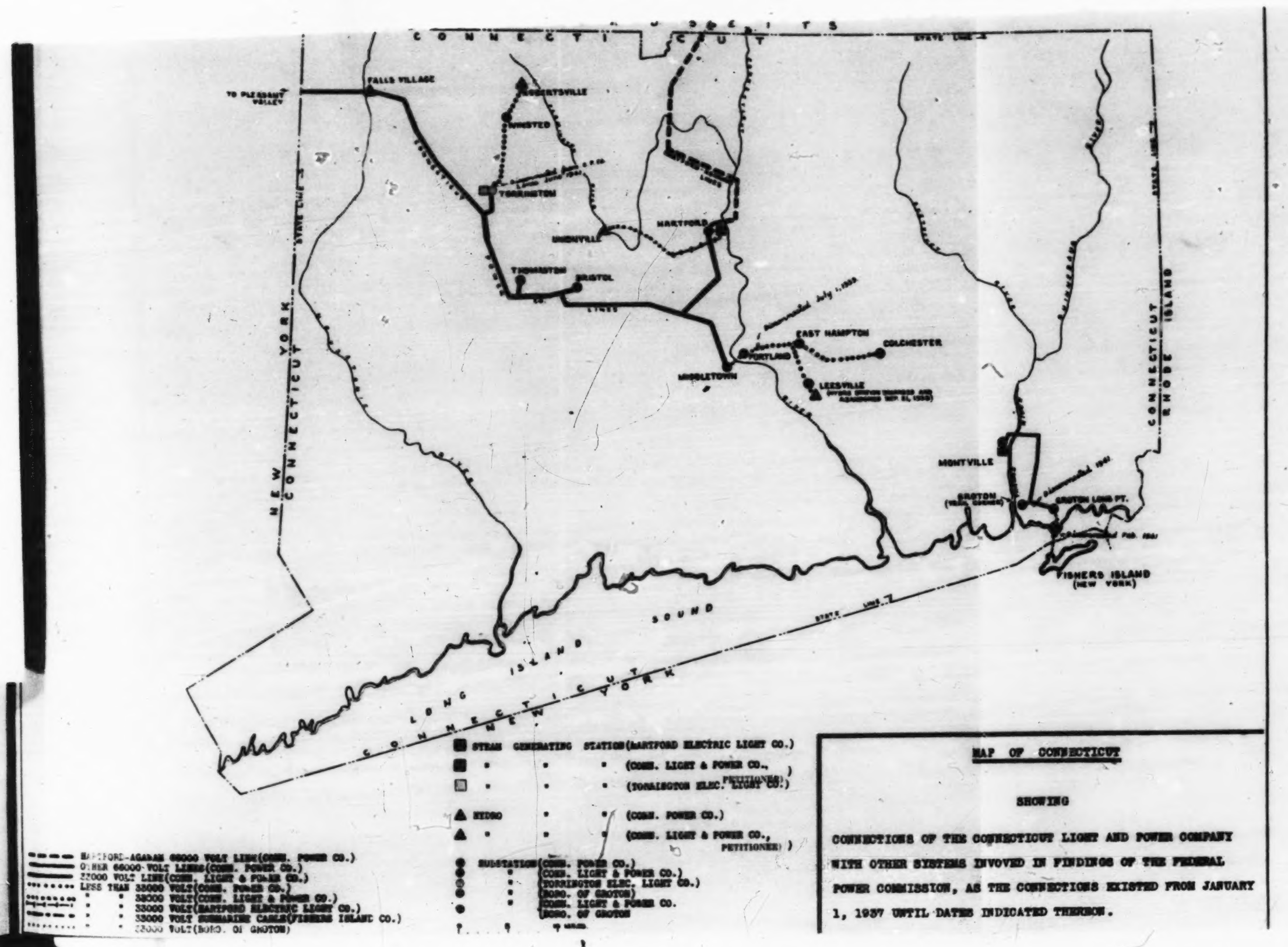
[10] 49 Stat. 860, U.S.C. Title 16, § 825*l*(b).



MAP OF CONNECTICUT

SHOWING

CONNECTIONS OF THE CONNECTICUT LIGHT AND POWER COMPANY WITH OTHER SYSTEMS INVOVED IN FINDINGS OF THE FEDERAL POWER COMMISSION, AS THE CONNECTIONS EXISTED FROM JANUARY



MAP OF CONNECTICUT

SHOWING

CONNECTIONS OF THE CONNECTICUT LIGHT AND POWER COMPANY WITH OTHER SYSTEMS INVOVED IN FINDINGS OF THE FEDERAL POWER COMMISSION, AS THE CONNECTIONS EXISTED FROM JANUARY 1, 1937 UNTIL DATES INDICATED THEREON.